89-110

No._____

Supreme Court, U.S.
FILED
JUL 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

THOMAS ENGLERT, D/B/A NORTHEAST ELECTRICAL INSPECTION AGENCY,

Petitioner,

vs.

CITY OF McKEESPORT and MIDDLE DEPARTMENT INSPECTION AGENCY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

1. Whether the Sherman Act prohibits the adoption and enforcement of a municipal ordinance which, without providing for municipal supervision over prices, requires all electrical contractors performing work within the municipality to retain the services of a designated private inspection company to the exclusion of other inspection companies?

2. Whether a municipality's enforcement of an ordinance, under which all electrical contractors must retain the services of a designated private inspection company to the exclusion of all other inspectors, is a type of "hybrid restraint" which is proscribed by Section 1 of the Sherman Act even if unilaterally adopted by the municipality?

3. Whether a scheme under which a municipality has appointed a private company as the exclusive entity authorized to perform electrical inspections, which does not include any municipal regulation or supervision of the fees charged by the private inspector for such services, is exempt from antitrust scrutiny by virtue of the *Parker v. Brown* state action exemption?

Parties

The parties to the proceeding in the Court of Appeals were Thomas Englert d/b/a Northeast Electrical Inspection Agency;* the City of McKeesport, a political subdivision of the Commonwealth of Pennsylvania; and Middle Department Inspection Agency.

* Pursuant to Rule 28.1, Englert discloses that his inspection company is a sole proprietorship, and that he is not affiliated with any publicly owned corporation.

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Petitioner, Thomas Englert, d/b/a Northeast Electrical Inspection Agency ("Englert"), respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on April 20, 1989.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Circuit is reported at 872 F.2d 1144, and is reproduced as Appendix A. The November 3, 1988 Opinion of the United States District Court for the Western District of Pennsylvania is reported at 698 F.Supp. 99, and is reproduced as Appendix B.

Prior opinions of the District Court and Court of Appeals in this case include the District Court's June 7, 1983 Opinion dismissing the Amended Complaint, published at 564 F.Supp. 375 and reproduced as Appendix F; the Court of Appeals' June 11, 1984 Opinion reversing the District Court's dismissal of the Amended Complaint, published at 736 F.2d 96 and reproduced as Appendix E; the District Court's June 18, 1986 Opinion denying defendants' motions for judgment on the pleadings, published at 637 F.Supp. 930 and reproduced as Appendix C; and the District Court's August 22, 1986 Opinion denying defendants' supplemental motions for judgment on the pleadings, published at 640 F.Supp. 1329 and reproduced as Appendix D.

JURISDICTION

The Court of Appeals issued its Opinion and Judgment on April 20, 1989. This Petition is filed within 90 days of that date. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act provides in relevant part: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." 15 U.S.C. §1.

Section 2 of the Sherman Act creates liability for every person "who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." 15 U.S.C. §2.

STATEMENT OF THE CASE

A. Factual Statement

This action involves a challenge to the legality and enforcement of a resolution enacted by the City of McKeesport on May 5, 1982, under which McKeesport designated a private company, Middle Department Inspection Agency ("MDIA"), as the only entity authorized to perform electrical inspections in McKeesport. Under the resolution as enforced by McKeesport, any electrical contractor performing work in McKeesport must retain MDIA to perform an electrical inspection, and is precluded from retaining the services of other electrical inspection companies. McKeesport places no restrictions on, and does not otherwise regulate or control, the fees or prices charged by MDIA, which are entirely paid by the electrical contractors and are retained by MDIA.

Thomas Englert operates an electrical inspection company which is in competition with MDIA. Englert, who is fully certified by the various public utilities[1] as being qualified to perform electrical inspections, began his business in September, 1981 following the termination of his employment as an inspector with MDIA. After Englert commenced his business in September, 1981, he began performing inspections in various municipalities in the Western Pennsylvania area,

[1] Typically, public utilities require as a condition to supplying power to a house or building that any electrical work be inspected by a recognized and certified electrical inspector. Thus, electrical contractors performing work must retain the services of electrical inspectors such as Englert and MDIA to inspect the work and to certify to the utility that it is in conformity with the various electrical and fire codes. In the absence of municipal ordinances such as the McKeesport resolution challenged in this case, the electrical contractor is free to retain any electrical inspector recognized and certified by the public utility.

including the City of McKeesport. Even though Englert had not been regularly assigned to the McKeesport area during his tenure as an inspector with MDIA, Englert achieved a high level of success in obtaining inspection business in McKeesport following the formation of his business.

On May 5, 1982, the City of McKeesport enacted a resolution which authorized and directed City officials to enter into an agreement with MDIA for the provision of all electrical inspection work to be done within the City of McKeesport (Exhibit 1 to Amended Complaint). The resolution provided as follows:

> That the proper City officials be and are hereby authorized and directed to enter into an Agreement with Middle Department Inspection Agency to provide for all electrical inspections for all electrical work done within the City of McKeesport.

Prior to the enactment of the resolution, McKeesport officials had discussed the proposed resolution with the MDIA inspector assigned to the geographic area encompassing McKeesport, who was present at the meeting at which the resolution was formally adopted.

Subsequent to the enactment of the May 5, 1982 resolution, McKeesport officials typically advised electrical contractors or property owners that any electrical work performed on property located in McKeesport required an inspection by MDIA prior to the issuance of an occupancy permit by the City. Prior to this conduct by McKeesport, contractors had the freedom to select any electrical inspector who was recognized and certified by the public utility as qualified to perform the electrical inspection required by the utility as a condition to supplying power to the building or residence involved. See note 1, *supra*.

Both MDIA and McKeesport have admitted that McKeesport does not exercise any control or supervision over the rates charged by MDIA for the inspection work performed in the City. Answer of MDIA at ¶8; Answer of City of McKeesport at ¶8. Thus, MDIA is vested with authority to charge the electrical contractors or property owners whatever fee it desires for its electrical inspection services. All of that fee is retained by MDIA. Electrical contractors have no choice but to pay the fee imposed by MDIA, and are precluded from retaining other electrical inspection companies such as Englert's, even if the fees charged by those competitors are lower than those imposed by MDIA.

Not surprisingly, following the enactment of the May 5, 1982 resolution, Englert's ability to perform electrical inspection work in McKeesport was severely curtailed. Although Englert continued to perform minor inspection work on projects which did not require a building permit and therefore did not require the issuance of an occupancy permit by City officials, Englert was essentially prohibited from continuing to compete for inspection work on the majority of construction projects in the City of McKeesport. The effect of the May 5, 1982 resolution was to vest MDIA with a virtual monopoly for inspection work in McKeesport, by preventing electrical contractors from using an inspector other than MDIA on all projects requiring a building permit or occupancy permit.

B. Proceedings Below

On March 18, 1983, Englert commenced suit in the United States District Court for the Western District of Pennyslvania. Englert's Complaint and Amended Complaint alleged that the resolution, and the relationship established between McKeesport and MDIA pursuant to that resolution, violated Sections 1 and 2 of the Sherman Act.[2] In his Complaint, Englert sought declaratory and injunctive relief to prevent McKeesport's continued enforcement of the May 5, 1982 resolution, as well as damages for the loss of business he sustained following the City's enactment of the resolution.

Following filing of the Complaint in March, 1983, both defendants filed motions to dismiss for lack of jurisdiction and failure to state a claim, under Rules 12(b)(1) and (b)(6) of the Federal Rules of Civil Procedure. These motions asserted that the Complaint filed by Englert did not adequately allege a nexus between the inspection activities occurring within McKeesport and interstate commerce, as required by the jurisdictional and substantive provisions of the Sherman Act. Eventually, these motions were resolved by a decision of the Third Circuit in which that court ruled that Englert's Amended Complaint adequately alleged that the McKeesport resolution adversely affected interstate commerce by asserting that as a result of McKeesport's

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[2] The Complaint and Amended Complaint filed by Englert also alleged various other claims not relevant to this Petition, including claims for attempted monopolization which were voluntarily dismissed by Englert following the conclusion of discovery in this case, and claims that the failure of McKeesport to follow any procedural safeguards prior to the enactment of the resolution, such as consideration of qualifications of competitor inspection companies and advertisement of the availability of the exclusive inspection position, violated the Pennsylvania and United States Constitutions.

exclusive designation of MDIA, inspection fees which were interstate in nature had been shifted from Englert to MDIA. See App. E at 5-7.[3]

Following that decision by the Third Circuit, and after discovery limited to the defense asserted by both defendants that the McKeesport/MDIA scheme for electrical inspections was exempt from antitrust scrutiny by virtue of *Parker v. Brown* state action immunity, both defendants filed motions for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. On June 18, 1986, the District Court issued an Opinion and Order ruling that because McKeesport and MDIA admitted that McKeesport exercised no active supervision over the fees charged by MDIA for electrical inspection work, McKeesport and MDIA were precluded from successfully invoking the *Parker v. Brown* state action exemption. See Appendix C. In that regard, the District Court first noted that the challenged exclusive-dealing relationship involved a delegation by the municipality to a private party. Accordingly, the District Court ruled that in order to invoke state action immunity McKeesport and MDIA not only were required to show that the delegation was pursuant

[3] Englert initially responded to the Rule 12(b) motions by amending his Complaint to include more detailed allegations concerning the interstate commerce implicated by electrical inspection work in McKeesport. Notwithstanding that amendment, on June 7, 1983, the District Court dismissed the Amended Complaint, concluding that Englert had failed to adequately allege that defendant's conduct had adversely affected interstate commerce. See App. F at 2-4. In reversing that determination, the Third Circuit relied upon Englert's allegations "that the fee charged for electrcal inspections is in many cases paid by out-of-state electrical and general contractors", and noted that Englert's additional allegation "that many construction projects requiring electrical inspection are financed with federal funds, and that federal funds pay the inspection fees in these cases ... would be sufficient to meet the jurisdictional requirement of Sections 1 and 2 of the Sherman Act." App. E at 6.

to a clearly articulated state policy, but also were required to establish that the conduct of the private party was actively supervised by the municipality. App. C at 2-6. The District Court concluded that "the admission of defendants that McKeesport maintains no control over Middle Department's fees is sufficient as a matter of law to preclude a finding of state action immunity since there is not 'adequate state supervision' over fee-setting." App. C at 5 (citing *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)).

Following the completion of discovery, all parties filed motions for summary judgment. Englert filed a Motion for Partial Summary Judgment as to liability, asserting that application of the prior rulings of the District Court and of the Third Circuit compelled a conclusion that the McKeesport/MDIA exclusive arrangement violated Sections 1 and 2 of the Sherman Act. McKeesport and MDIA also filed summary judgment motions, claiming that because Englert could not establish that MDIA had participated in the passage of the May 5, 1982 ordinance, Englert's claims under Sections 1 and 2 of the Sherman Act should be dismissed.

On November 3, 1988, the District Court issued an Opinion and Order denying Englert's Motion for Partial Summary Judgment on Liability, and granting the Motions for Summary Judgment filed by McKeesport and MDIA. The District Court concluded that because Englert could not establish that MDIA had solicited or participated in the passage of the May 5, 1982 ordinance, Englert could not establish the existence of a "contract, combination . . . or conspiracy" as required by Section 1 of the Sherman Act. App. B at 2-5. For the same reason, the Court ruled that Englert's Section 2 claim should be

dismissed because Englert could not establish that MDIA's exclusive status as McKeesport's designated electrical inspector reflected a willful acquisition of monopoly power. App. B at 3-5.

On appeal, the Third Circuit affirmed the District Court's summary dismissal of Englert's Sherman Act Claims. As to Englert's Section 1 claim, the Court of Appeals agreed with the District Court's conclusion that a prerequisite to establishing liability under Section 1 was evidence which would support an inference that MDIA somehow induced or participated in the passage of the May 5, 1982 resolution. App. A at 12-13. The Court of Appeals rejected Englert's argument that the "combination, contract or conspiracy" requirement of Section 1 was satisfied by the exclusive-dealing relationship between MDIA and McKeesport which *resulted* from the passage of the resolution, concluding that at most, the evidence established that "MDIA ... acquiesced to McKeesport's exclusive appointment and accepted the position created by the ordinance." App. A at 16.

The Court of Appeals also rejected Englert's argument that the enforcement of the May 5, 1982 resolution by McKeesport constituted a type of "hybrid restraint" within the meaning of the principles articulated by this Court in decisions such as *Fisher v. City of Berkeley*, 475 U.S. 260 (1986). Distinguishing decisions such as *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) on the basis that they involved state-authorized price maintenance agreements, the Court of Appeals concluded that in the instant case, "the only parties are MDIA and McKeesport and thus the only alleged concerted action in this case exists between them." App. A at 18. The Court did not address the argument asserted by Englert

that the hybrid restraint analysis was applicable in light of the existence of what amounts to a group boycott of Englert's services by the electrical contractors performing work in McKeesport, who must retain the services of MDIA in order to comply with McKeesport's resolution.

Finally, the Court of Appeals upheld dismissal of Englert's claim that the unregulated monopoly created by the enactment and enforcement of the May 5, 1982 resolution constituted a violation of Section 2 of the Sherman Act. As to that claim, the Court ruled that the evidence did not establish MDIA's willful acquisition or maintenance of its exclusive position in McKeesport, but to the contrary its monopoly was "thrust upon it" by virtue of the May 5, 1982 resolution. App. A. at 17.

REASONS FOR GRANTING THE WRIT

The result reached by the Court of Appeals in this case is startling. Notwithstanding the undisputed fact that MDIA has been granted a total monopoly for inspection work in McKeesport, and the admissions by both McKeesport and MDIA that McKeesport exercises no control or supervision over the rates charged by MDIA and paid by the electrical contractors required to use MDIA's services, the Court of Appeals ruled that federal antitrust law provides no remedy because the municipal regulation which created the exclusive arrangement was unilaterally adopted. The result upheld by the Court of Appeals, therefore, provides for the preservation of a governmentally-sanctioned monopoly under circumstances in which electrical contractors performing work in McKeesport (1) must continue to hire MDIA and to boycott other inspectors such as Englert; and (2) must continue to pay to MDIA fees set without any control or supervision by the municipality, and without any impact from the competitive forces that would exist if other inspectors were permitted to compete in the market.

The decision of the Court of Appeals is inconsistent with the principles enunciated by this Court in its numerous decisions involving the applicability of federal antitrust law to state and municipal conduct. If not corrected by this Court, the decision below could have far-reaching effects with respect to municipal regulation. Essentially, the Third Circuit has ruled that a municipality may impose virtually any restriction or restraint upon competition, so long as that restraint is imposed unilaterally. Under this rule, a municipality could, for example, enact an ordinance requiring all contractors building new homes within its boundaries to purchase all lumber from a specified lumberyard at

whatever price the private lumberyard chooses to charge. Under the analysis of the Court of Appeals, such an obvious restraint upon competition would not be proscribed by the Sherman Act unless evidence existed which demonstrated that the designated lumberyard induced or participated in the passage of the ordinance.

Because the Court of Appeals has incorrectly decided an important question concerning the interplay between municipal regulation and federal antitrust law, the Court should grant Englert's petition and give plenary consideration to the issues raised herein.

A. The Court Of Appeals Has Incorrectly Decided An Important Question Of Federal Antitrust Law In A Manner Which Is Inconsistent With This Court's Decisions, Including The Decision In *Fisher v. City of Berkeley*.

In *Fisher v. City of Berkeley*, 475 U.S. 260 (1986), this Court upheld a city rent control ordinance against an antitrust challenge. Noting that the rent control ordinance had been enacted by the city unilaterally, and emphasizing that under the ordinance ultimate control over the maximum rent levels was vested exclusively in the hands of the city's rent stabilization board, this Court concluded that no Section 1 conspiracy existed. 475 U.S. at 266-270. Justice Marshall strongly stated, however, that there could exist certain "hybrid restraints" which, even though imposed unilaterally, could not pass muster under Section 1. The Court cited prior decisions such as *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384 (1951) and *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), as examples of situations in which private actors where vested with a "degree of private

regulatory power" which in the absence of adequate governmental supervision, implicated Section 1 of the Sherman Act. *See* 475 U.S. at 267-268.

Justice Marshall's description of these types of "hybrid restraints" had its genesis in the Court's earlier opinion in *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982). In that case, the Court upheld a California "designation" statute which enabled a distiller to designate an exclusive California importer of its brand of alcoholic beverages. Writing for the Court, Chief Justice Rehnquist stated that a statute authorizing or compelling conduct which restrains trade is violative of Section 1 of the Sherman Act only if the conduct contemplated by the statute is in all cases a "per se" violation. 458 U.S. at 661.

In the instant case, the Court of Appeals ruled that the "hybrid restraint" analysis articulated by this Court in *Fisher v. City of Berkeley* was inapplicable to McKeesport's enforcement of the May 5, 1982 resolution. The Third Circuit distinguished this Court's decisions in *Midcal* and *Schwegmann Bros.*, stating that "the only parties are MDIA and McKeesport and thus the only concerted action in this case exists between them." App. A at 18. In its analysis, the Court of Appeals totally ignored the involvement of the electrical contractors, who are required to boycott Englert and hire MDIA in order to comply with McKeesport's resolution.

Contrary to the conclusion of the Court of Appeals, the system for electrical inspections in McKeesport is as much a creation of "private regulatory power" as the pricing systems which were found to be invalid in *Midcal, supra*, and *Schwegmann Bros., supra*. In essence, the McKeesport ordinance mandates a group boycott of

all inspection companies other than MDIA by all electrical contractors performing work in McKeesport. MDIA, in turn, has the unfettered discretion to charge the contracctors any fee it deems appropriate; the contractors have no leeway to negotiate a better price, no avenue of appeal, and no alternative but to pay the fee demanded by MDIA.

Thus, the exclusive-dealing arrangement between McKeesport and MDIA in effect creates two restraints, both of which constitute, in all cases, violations of the Sherman Act. First, as stated *supra*, the effect of the adoption and implementation of the May 5, 1982 resolution was to create an exclusive monopoly for MDIA, with absolutely no municipal control or supervision over MDIA's price-setting practices. This monopoly violates Section 2 of the Sherman Act.

More importantly, the ordinance mandates a group boycott of all inspection companies other than MDIA by all electrical contractors performing work in McKeesport. As a condition to obtaining an occupancy permit, all electrical contractors are required to employ MDIA to the exclusion of other inspection companies, such as Englert's. The effect of the McKeesport ordinance, therefore, is the creation of a governmentally-compelled group boycott, a type of restraint which has always been viewed as a *per se* violation of Section 1 of the Sherman Act. *See United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

The unregulated and unsupervised monopoly created by the McKeesport ordinance is, therefore, exactly the type of restraint which falls with the "hybrid restraint" analysis articulated by this Court in *Fisher v. City of Berkeley* and *Rice v. Williams*. Because the decision of

the Third Circuit departs so drastically from the principles enunciated by this Court in those decisions, and in light of the importance of the issue concerning the effect of federal antitrust law upon municipal regulation, this Court's plenary review is necessary.

B. The Decision Of The Court Of Appeals Is Inconsistent With The Decisions Of This Court Concerning The Applicability Of Federal Antitrust Law To State And Municipal Conduct.

The decisions of this Court addressing the applicability of federal antitrust law to state or municipal conduct have repeatedly emphasized that in order for the state action exemption to apply to the conduct or activity of a private party, there must be direct and active supervision by the state or municipality over the conduct of the private party. For example, in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), California's system of regulating wine prices was invalidated because the state exercised no control or limitation over the level at which prices were set. Similarly, in *Hallie v. City of Eau Claire,* 471 U.S. 34 (1985), the Court emphasized that "where a private party is engaging in . . . anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the state." 471 U.S. at 47. Accordingly, this Court confirmed that "where state or municipal regulation by a private party is involved . . . active state supervision must be shown even where a clearly articulated state policy exists." *Id.* at 46, n.10.

The Third Circuit's decision in the instant case departs from these long-standing principles, by leaving intact what amounts to an unregulated and unsupervised monopoly. Both McKeesport and MDIA admitted in answers to Englert's Amended Complaint that

McKeesport exercises no control or supervision over the rates charged by MDIA for its services. *See* page 7, *supra*. The Third Circuit's conclusion that the unregulated monopoly for electrical inspections in McKeesport is insulated from antitrust scrutiny because of the absence of evidence that MDIA participated in the enactment of the resolution departs from the proper analysis which should be applied to determine the legality of a municipality's award of an exclusive franchise to a private party.

Contrary to the Court of Appeals' conclusion, a Section 1 conspiracy or combination need not be demonstrated by the existence of an explicit agreement between the parties. *See, e.g., United States v. General Motors Corp.*, 384 U.S. 123, 143 (1966). In order to establish a conspiracy or combination, a plaintiff need establish only the existence of a plurality of persons who "had a conscious commitment to a common scheme to achieve an unlawful objective." *Monsanto Co. v. Spray-Wright Service Corp.*, 465 U.S. 752, 764 (1984). Clearly, the MDIA/McKeesport relationship satisfies this test—McKeesport appointed MDIA as its inspector and MDIA accepted that appointment. Indeed, the Court of Appeals admitted as much in noting that the evidence supported an inference that MDIA "acquiesced to McKeesport's exclusive appointment and accepted the position created by the ordinance." App. A at 16.[4]

[4] In concluding that MDIA's acceptance of McKeesport's appointment as the exclusive inspection agent was not sufficient to establish a combination or conspiracy, the Court of Appeals disregarded principles of traditional conspiracy law, which has long recognized that tacit agreement or acquiescence can be a basis upon which a finding of conspiracy may be predicated. *E.g., Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir., 1983) ("proof of a tacit, as opposed to explicit, understanding is sufficient to show agreement"); *United States v. Alemeny Rivera*, 781 F.2d 229, 234 (1st Cir., 1985), *cert. denied*, 475 U.S. 1086 (1986) ("conspiratorial agreement need not be express, but may consist of no more than a tacit understanding").

The McKeesport/MDIA combination is no different than the many other types of governmental exclusive franchises which have always been subject to scrutiny under the Sherman Act. *See, e.g., Tom Hudson & Associates v. City of Chula Vista*, 746 F.2d 370 (9th Cir. 1984), *cert. denied*, 472 U.S. 1028 (1985) (City's award of exclusive franchise for trash collection upheld because city reviewed and supervised rates charged by private collection company); *Independent Taxicab Driver Employees v. Greater Houston Transportation Co.*, 760 F.2d 607 (5th Cir.), *cert. denied*, 474 U.S. 903 (1985) (airport authority's grant of exclusive franchise to taxicab company upheld). Although, as these and the numerous other exclusive franchise cases make clear, a municipality's grant of a franchise to a private party is often upheld against antitrust challenges by disappointed competitors, the basis for that result is most often the conclusion that the exclusive designation is coupled with active supervision and therefore is protected by *Parker v. Brown* immunity. Unlike the Third Circuit, these other courts of appeals have never ruled that such exclusive franchise arrangements do not constitute an agreement or combination within the meaning of the Sherman Act.

The applicability of federal antitrust law to the conduct of a municipality in eliminating competition within its boundaries is an important issue which merits this Court's plenary review. Because the decision of the Third Circuit departs so drastically from long-standing principles of federal antitrust law, this Court should grant Englert's Petition and correct the Third Circuit's erroneous interpretation of the Sherman Act.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit, Dated April 20, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3773

THOMAS ENGLERT d/b/a NORTHEAST ELECTRICAL INSPECTION AGENCY,
Appellant

v.

CITY OF McKEESPORT

and

MIDDLE DEPARTMENT INSPECTION AGENCY

On Appeal from the United States District Court
for the Western District of Pennsylvania
(District Court No. 83-653)

Argued March 15, 1989
BEFORE: MANSMANN, GREENBERG and SCIRICA,
Circuit Judges
(Filed April 20, 1989)

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OPINION OF THE COURT

GREENBERG, *Circuit Judge.*

Thomas Englert, doing business as Northeast Electrical Inspection Agency, brought this action against the City of McKeesport, Pennsylvania, and the Middle Department Inspection Agency (MDIA), a private contractor, under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2, and under the Pennsylvania Constitution as a pendent claim. The district court granted summary judgment on the Sherman Act claims and dismissed the pendent Pennsylvania constitutional claim with prejudice by an opinion and order of November 3, 1988.

Inasmuch as we conclude that Englert did not and cannot prove concerted action between the defendants, an essential element of his Sherman Act claims, we will affirm the granting of the summary judgment. We will,

however, vacate the judgment to the extent it dismissed the pendent state constitutional claim with prejudice and we will remand the matter for entry of an order dismissing that claim without prejudice.

I. BACKGROUND

Notwithstanding the extended length of this litigation, the facts, insofar as material to this appeal, are neither complicated nor in dispute. MDIA has for some time been engaged in the business of providing electrical inspections in McKeesport and elsewhere. McKeesport requires such inspections on much of the electrical work within the city and unless it has the inspection results will not issue an occupancy permit where one is required.

Englert was an electrical inspector employed by MDIA until August 27, 1981, when he was fired.[1] *See Englert v. City of McKeesport*, 698 F. Supp. 99, 100 (W.D. Pa. 1988). In September, 1981, Englert founded Northeast Electrical Inspection Agency and began to compete with MDIA for business in Western Pennsylvania. When Englert went into business, persons needing electrical inspections were free to select an electrical inspector of their choice in McKeesport. Englert was initially successful in McKeesport as he received fees of $2,539 there during his first eight months of business while MDIA received fees of $3,714 in McKeesport over the same period. *See id.*

Shortly after Englert went into business, McKeesport contemplated making MDIA its exclusive inspector. Accordingly, Robert Jaworski, the city electrician, met with Theodore E. Javorsky, the MDIA

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1. It appears that he was fired because he was going to form his own business but it also appears that MDIA was not satisfied with his work.

inspector assigned to the geographic area encompassing McKeesport, and told him of McKeesport's plans and asked for an explanation of how MDIA functioned. Javorsky testified that this was the only exchange he had with McKeesport officials concerning MDIA becoming McKeesport's exclusive inspector. Javorsky testified, however, that Jaworski contacted him and asked him to attend a meeting of the city council on May 5, 1982, at which the council would consider making MDIA the city's exclusive inspector and he did so. He further testified that he sat with Jaworski at the meeting but was asked no questions.

At the meeting, the city council enacted a resolution[2] designating MDIA as the only entity authorized to perform electrical inspections in the city. The district court found, and it is undisputed, that thereafter McKeesport would not issue an occupancy permit unless MDIA had performed the electrical inspection. *See Englert*, 698 F. Supp. at 100. The resolution stated:

> WHEREAS, the City of McKeesport, under its broad police powers may designate an individual or firm as its electrical inspector to ensure that all electrical work performed in the City of McKeesport is done pursuant to federal, state and local regulations; and

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2. The affidavit of McKeesport Mayor Louis Washowich states that the resolution was prepared without input from MDIA.

> [A]fter consultation with McKeesport fire chief Robert Matwick and City electrician Robert Jaworski, a decision was made by this affiant to propose a Resolution concerning the appointment of Middle department as electrical inspector for the City of McKeesport. This resolution was written without consultation or input from Middle Department Inspection Agency.

...

NOW, THEREFORE, BE IT RESOLVED, by the City of McKeesport, in Council Assembled ... That the proper City Officials be and are hereby authorized and directed to enter into an agreement with Middle Department Inspection Agency to provide for all electrical inspections for all electrical work done within the City of McKeesport.

McKeesport asserts that it enacted the resolution "in an effort to tighten up its enforcement of its building codes," *Englert*, 698 F. Supp. at 100, selecting MDIA because it "was uniquely well-qualified and reliable, and because MDIA's record keeping was efficient and beneficial to the City." *Id.*

Englert argues that McKeesport's selection of MDIA failed to include any procedural safeguards. Specifically, he argues in his brief:

> At no time prior to the passage of the May 5, 1982 resolution did McKeesport consider any other entities for inspection work, nor did McKeesport publicly advertise the intent to enact the May 5, 1982 resolution or otherwise publicly notify competitor companies about the availability of the exclusive right to perform electrical inspection work in McKeesport.

Englert set forth in his complaint that pursuant to this resolution "the City ... did, in fact, enter into an agreement with [MDIA], the essential terms of which are that [MDIA] is granted the exclusive right to perform all electrical inspections on electrical work done within the City of McKeesport." The district court found that the resolution significantly impaired Englert's business in McKeesport but that he was still free to perform some inspections. "If a project required a City Occupancy Permit, the Contractor could not employ plaintiff's firm because the City would only

issue the permit upon receipt of an MDIA report. Therefore, plaintiff could only perform inspections on jobs that did not require Occupancy Permits, precluding plaintiff from a large segment of the work available in McKeesport." *Englert*, 698 F. Supp. at 100. Consequently, Englert had only $1,981 of business in McKeesport from May of 1982, through November, 1986, while MDIA collected $40,147 in fees for inspections in McKeesport over the same period.[3]

After complaining unsuccessfully to McKeesport about the May 5, 1982, resolution, Englert brought this action on March 18, 1983, in a six count complaint. Count I stated an action for unlawful restraint of trade under section 1 of the Sherman Act. Count II set forth that the exclusive arrangement violated section 2 of the Sherman Act. Count III alleged that MDIA had been engaged in various activities including misrepresentation for a period of several years with the specific intent to obtain a monopoly in western Pennsylvania in violation of section 2 of the Sherman Act. Count IV stated a cause of action for state law unfair competition, commercial disparagement and slander *per se*. Count V asserted that the alleged agreement between MDIA and McKeesport violated the Fourteenth Amendment protections of due process, privileges and immunities, and equal protection. Count VI asserted that the alleged exclusive agreement violated provisions of the Pennsylvania Constitution.

McKeesport and MDIA filed motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Each motion

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3. In addition to asserting that the resolution in general caused him to lose business Englert asserts that he lost a specific contract already awarded him.

included several grounds for relief and both asserted that the complaint insufficiently alleged a nexus with interstate commerce as required for an action under the Sherman Act. In response, Englert filed an amended complaint containing specific allegations with regard to the impact of the alleged McKeesport-MDIA agreement on interstate commerce. Thereafter, the defendants' motions were renewed.

The district court granted the motions to dismiss, *see Englert v. City of McKeesport*, 564 F. Supp. 375 (W.D. Pa. 1983), explaining that Englert's amended complaint failed adequately to allege the substantial and adverse impact on interstate commerce prerequisite to the applicability of the Sherman Act and to the court's jurisdiction. *See id.* at 376. In addition, the opinion summarily rejected each of the federal constitutional claims. *See id.* at 377. The court further concluded that, inasmuch as no federal claims remained, it would not exercise pendent jurisdiction over the state law claims. *See id.*

We reversed and remanded. *See Englert v. City of McKeesport*, 736 F.2d 96 (3d Cir. 1984). In our opinion we addressed only the dismissal of the Sherman Act claims,[4] although we indicated that the district court should reconsider the dismissal of the state law claims on remand. *See id.* at 97 n.2. We stated that the "dismissal of Eglert's federal constitutional claims [count V] has not been appealed." *Id.*

On remand, the defendants filed answers to the amended complaint admitting the content of the May 5, 1982, resolution, but denying that the resolution

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4. As we explained, the rationale for reversing the dismissal of the Sherman Act claims was that the district court relied upon *Cardio-Medical Assoc's, Ltd. v. Crozer-Chester Medical Center*, 552 F. Supp. 1170 (E.D. Pa. 1982), which we reversed, 721 F.2d 68 (3d Cir. 1983), after the district court had ruled on the motions to dismiss, *see Englert*, 736 F.2d at 97.

was the result of any improper activity between them and further denying that they had executed any agreement pursuant to the resolution. They also claimed that inasmuch as Englert had not appealed the dismissal of his federal constitutional claims they were not properly before the court. They asserted that the state action exemption from liability under Sections 1 and 2 of the Sherman Act applied in this case.

Thereafter, MDIA moved for a judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) on counts I and II of the amended complaint. This motion asserted that "Pennsylvania law authorizes the appointment of an electrical inspector by a municipality such as the City of McKeesport," and that McKeesport was immune from antitrust liability under the state action doctrine. In the alternative, MDIA argued that even if the resolution was enacted pursuant to an agreement it had with McKeesport, such conduct would be immune from antitrust liability under the *Noerr-Pennington* doctrine.[5] McKeesport also filed a Rule 12(c) motion for dismissal of counts I and II arguing that it was immune from liability under the state action doctrine.

On June 18, 1986, the district court denied the Rule 12(c) motions, *see Englert v. City of McKeesport*, 637 F. Supp. 930 (W.D. Pa. 1986), in an opinion which addressed only counts I and II of the amended complaint--the Sherman Act claims.[6] The court rejected the defendants' contention that they were immune under the state action doctrine, *see id.* at 931, the *Noerr-Pennington* doctrine, *see id.* at 934-35, or the Local Government Antitrust Act of 1984, Pub. L.

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5. *See Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585 (1965).

6. Consequently, the district court did not address the defendants' contention that the federal constitutional claims had been waived.

No. 98-544, 98 Stat. 2750, which was enacted at about the time that the motions for the judgments on the pleadings were being filed and was not mentioned in the motions by the defendants but was apparently raised later. *See Englert*, 637 F. Supp. at 935. But the court questioned whether Englert would be able to demonstrate an antitrust injury within the scope of his pleadings; that is, whether Englert had standing. *See id.* at 933-34. The court's standing concerns caused the defendants to make supplemental motions for judgments on the pleadings which were denied. *See Englert v. City of McKeesport*, 640 F. Supp. 1329 (W.D. Pa. 1986).

After this final Rule 12(c) ruling, discovery progressed. On January 5, 1987, Englert filed a motion to amend his complaint so as to dismiss counts III and IV, and on January 21, 1987, the district court filed an order dismissing them with prejudice.

After discovery, the defendants filed motions for summary judgment. MDIA asserted that there was insufficient evidence to create a genuine issue of fact with regard both to Englert's assertion that MDIA and McKeesport had entered into an agreement subsequent to the May 5, 1982, resolution and his assertion that MDIA had initiated or induced McKeesport's enactment of the resolution. MDIA also argued that count V was not properly before the court inasmuch as Englert had not appealed from the order that had dismissed it.[7] And, inasmuch as MDIA moved

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7. MDIA also reasserted defenses under the *Noerr-Pennington* doctrine and the state action doctrine. MDIA contended that discovery had failed to support Englert's assertion that MDIA's alleged conduct had a substantial adverse effect upon interstate commerce and that, consequently, no cause of action could be proven under either section 1 or 2 of the Sherman Act. MDIA also maintained that the record demonstrated that Englert had received business in McKeesport demonstrating that a monopoly had not been granted to MDIA.

for summary judgment on all of the other counts, it maintained that the pendent state law claims should be dismissed for lack of jurisdiction. McKeesport's motion for summary judgment merely incorporated MDIA's motion by reference, though it also included an affidavit of the mayor of McKeesport as additional evidence.

Englert filed a cross-motion for partial summary judgment on liability under counts I and II, asserting in his accompanying memorandum that there were no disputed issues of material fact. In his memorandum he conceded that "if the Court grants defendant's [sic] motion for summary judgment on the Sherman Act claims and dismisses those claims . . . it would probably be inappropriate to proceed with federal adjudication of the pendent state claims."

In an opinion and order dated November 3, 1988, and filed on November 4, 1988, the district court granted summary judgment for the defendants on counts I and II.[8] *See Englert*, 698 F. Supp. 99. The court premised this result on its conclusion "that plaintiff cannot produce sufficient evidence of 'concerted activity' or willful conduct by MDIA to

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MDIA contended that count VI was not before the court as Englert had not appealed from the dismissal of that count. But it was still viable as we had indicated it should be reconsidered on remand.

8. As we have explained count V was dismissed by the district court, *Englert*, 564 F. Supp. 375, when it granted the defendants' original motions to dismiss but the dismissal of this count was not appealed along with the remainder of that order. Counts III and IV were dismissed by the January 21, 1987, order. Englert conceded in his January 12, 1987, memorandum that count VI, which raised questions of state constitutional law, should be dismissed if counts I and II were dismissed. Thus, counts I, II, and VI were the subject of *Englert*, 698 F. Supp. 99, but the resolution of counts I and II was dispositive of count VI. Inasmuch as only counts I, II, and VI remained for disposition the November 3, 1988 order was final.

sustain his antitrust claims and summary judgment is therefore appropriate." *Id.* at 100. In addition, the court addressed the claims under the Pennsylvania constitution in count VI, stating:

> [t]he only other remaining claim is one asserted under the Pennsylvania Constitution. Defendants have sought summary judgment on this claim on various grounds and plaintiff has not opposed it. Therefore summary judgment will be granted to defendants and that claim will be dismissed with prejudice.

Id. Englert filed a timely notice of appeal from this final order.

We have jurisdiction by virtue of 28 U.S.C. § 1291 as an appeal from final judgment. The district court had subject matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1337, and 15 U.S.C. § 4. In reviewing the order for summary judgment our standard of review is plenary. *Metzger by and through Metzger v. Osbeck*, 841 F.2d 518, 519 (3d Cir. 1988).

II. THE SHERMAN ACT CLAIMS

Inasmuch as we find that the district court correctly concluded that Englert was unable to demonstrate the concerted action element of his claims we need not address the affirmative defenses raised in the district court.

Under section 1 of the Sherman Act Englert bears the burden of proof on each of four elements:

> (1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive affects within the relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the

> plaintiffs were injured as a proximate result of that conspiracy.

Arnold Pontiac - GMC, Inc. v. General Motors Corp., 786 F.2d 564, 572 (3d Cir. 1986); *accord Martin B. Glauser Dodge Co. v. Chrysler*, 570 F.2d 72, 81 (3d Cir. 1977), *cert. denied*, 436 U.S. 913, 98 S.Ct. 2253 (1978). In his brief, Englert concedes that he must prove these elements but maintains that the record contained sufficient evidence of each of them to warrant summary judgment on his behalf so that the defendants should not have been granted summary judgment. The first of these four elements requires some contract, combination, or conspiracy between the defendants and thus Englert was required to produce evidence proving that the resolution making MDIA the exclusive inspector was not simply the product of McKeesport's unilateral action. *See Arnold Pontiac - GMC, Inc.*, 786 F.2d at 572.

Englert's burden was similar under section 2. In this regard it is established that:

> [T]he offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident.

United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1704 (1966); *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1062 (3d Cir.), *cert. denied*, 439 U.S. 838, 99 S.Ct. 123 (1978). To prove that MDIA has "willfully acquired" monopoly power, Englert's burden under section 2 was essentially the same as under section 1: he was required to prove that McKeesport did not unilaterally decide to grant an exclusive franchise to MDIA, but that MDIA

contributed to the passage of the resolution, and thus willfully obtained a monopoly. Englert sets forth in his brief that "MDIA has obtained a monopoly in the McKeesport market for electrical inspection as a result of the McKeesport/MDIA exclusive dealing arrangement and that MDIA is therefore liable for monopolization under Section 2 of the Sherman Act." Thus, Englert appears also to allege the existence of a combination or conspiracy to monopolize. While a conspiracy under section 1 differs from one prohibited under section 2, both require concerted action.

The Supreme Court in a section 1 case explained the proof necessary to establish concerted action:

> [t]here must be evidence that tends to exclude the possibility that the [defendants] were acting independently. As Judge Aldisert has written, the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the [defendants] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S.Ct. 1464, 1471 (1984) (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911, 101 S.Ct. 1981 (1981)).

At oral argument before this court Englert's attorney conceded that he could not prove that the passage of the May 5, 1982, resolution was the result of concerted action.[9] Nonetheless, he maintained that there was concerted activity demonstrated by MDIA's

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9. Previously, Englert had conceded as much in his brief: "there is little evidence which would support an inference that defendant MDIA induced the passage of the May 5, 1982 resolution or otherwise participated in the deliberations of McKeesport concerning that resolution."

actions in performing inspections pursuant to the exclusive arrangement resulting from the resolution.[10] It is well settled, however, that a restraint established through unilateral action by the government is not transformed into concerted action merely because the government enforces it. "A restraint imposed unilaterally by government does not become concerted action within the meaning of the [Sherman Act] simply because it has a coercive effect upon parties who must obey the law." *Fisher v. City of Berkeley*, 475 U.S. 260, ___, 106 S.Ct. 1045, 1049-50 (1986). Here, as in *Fisher*, there was "no meeting of the minds." *Id.* at ___, 106 S.Ct. at 1050.

The district court reviewed Englert's presentation on the concerted action issue and stated that the only evidence which "even arguably supports a finding of concerted activity" was that (1) MDIA provided information to McKeesport before the ordinance was passed; (2) a representative of MDIA attended the council meeting at which the ordinance was passed; (3) this representative sat with the city's electrician during this meeting; (4) the city advised contractors of the need to hire MDIA under the new ordinance; and, (5) MDIA accepted and performed all work requested of it. *See Englert*, 698 F. Supp. at 101.

The district court considered and found that the five factors relied upon by Englert did not individually or together establish that the resolution was the product of concerted action between McKeesport and MDIA. The district court discounted the first point:

> [c]ourts have recognized the mere fact that defendants have communicated prior to accomplishment of the exclusive arrangement is not alone sufficient evidence of concerted activity. The City and electrical inspectors in the course of

10. This argument was also presented in Englert's brief.

> their dealings have a legitimate interest in the free exchange of information.

Id. (citations omitted). Both *Monsanto*, 465 U.S. at 762-63, 104 S.Ct. at 1470, and *Sweeney & Sons, Inc.*, 637 F.2d at 110, support this conclusion and the district court properly found that this fact was not probative of concerted activity.

The district court also rejected the second and third points:

> [i]s there anything unusual in MDIA's having a representative at a public meeting concerning legislation affecting the company? Or in having that person sit next to the City employee who routinely deals with electrical inspectors? These facts are perfectly consistent with independent action by the City and they do not tend to preclude the possibility of independent action.

Englert, 698 F. Supp. at 101. We agree with the district court's analysis; neither of these facts is probative of concerted activity. Finally, the district court rejected the fourth and fifth points inasmuch as they "occurred after the fact and are perfectly consistent with innocent, independent action by the City." *Id.*

The crux of Englert's appeal is that the district court did not give adequate weight to these last two factors because the court focused on determining whether there was concerted activity in the passage of the resolution rather than also considering MDIA's performance under the resulting arrangement. Englert insists that the uncontested facts of record demonstrate a conspiracy which *resulted* from the passage of the May 5, 1982, resolution. He argues in his brief that:

> [t]he undisputed facts establish that as a result of the May 5, 1982 resolution, McKeesport vested

> MDIA with a virtual monopoly for all inspection services performed in McKeesport. The undisputed facts also establish MDIA's participation in this combination or conspiracy, reflected by MDIA's agreement to serve as the exclusive electrical inspector for McKeesport, to perform inspections as needed, and to supply reports of the inspections to McKeesport following the completion of the work by MDIA.
>
> . . . At no point did MDIA advise McKeesport that it did not desire to be the exclusive inspector, would not accept that position, or would not otherwise fulfill its role in this combination by performing inspections and performing any other functions required by McKeesport.

Englert also relies on the language of the resolution to suggest that the defendants had entered into an agency relationship or, in the alternative, that they had entered into a contractual arrangement.

We cannot accept Englert's position. The most the proofs established was, as Englert sets forth in his brief, that "MDIA's conduct clearly evidences that it *acquiesced* to McKeesport's exclusive appointment and accepted the position created by the ordinance." Thus, this case does not involve concerted action. What it does involve is the acceptance by MDIA of the unilateral appointment by McKeesport. Furthermore, we cannot understand how MDIA could have avoided the appointment except by refusing business. We also point out that although Englert asserts that McKeesport officials advised contractors and property owners of the necessity of hiring MDIA for inspection work, Englert does not refer to any instance in which

MDIA participated in this activity.[11] This case simply does not involve willful acquisition or maintenance by MDIA of its exclusive position in McKeesport. Quite to the contrary, its position was literally thrust upon it.

In reaching our result, we have not overlooked Englert's argument that the resolution constituted a "hybrid restraint" which *Fisher v. City of Berkeley* recognized could violate section 1. Rather, we do not accept the argument as the record before us does not support this characterization.

Fisher stated that "[n]ot all restraints imposed upon private actors by government units necessarily constitute unilateral action outside the purview of § 1. Certain restraints may be characerized as 'hybrid,' in that nonmarket mechanisms merely enforce private marketing decisions." 475 U.S. at ___, 106 S.Ct. at 1050. As the Court then noted it had found such hybrid restraints and held them violative of the Sherman Act in *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 71 S.Ct. 745 (1951), and *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937 (1980).

In *Schwegmann Brothers* and *Midcal* groups of individuals engaged in concerted activity in which a government actor also joined. *Schwegmann Brothers* involved a price-fixing scheme between interstate distributors of liquors by which retailers signed price-fixing contracts promising not to sell at less than the prices stated in the distributors' schedules. 341 U.S. at 385, 71 S.Ct. at 746. Over one hundred retailers signed such price maintenance contracts. *Id.* This action clearly violated the Sherman Act and the

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11. We do not imply that our result would have been different if MDIA had advised persons needing inspections of its exclusive status. Rather, we are simply ruling on the basis of the facts in the record.

only issue was whether a Louisiana statute authorizing this practice served to insulate the distributors and retailers from liability. *See id.* at 368, 71 S.Ct. at 746. Thus, even in the absence of the Louisiana statute there was sufficient concerted activity to establish a prima facie violation of the Sherman Act.

Midcal presented a similar price-fixing scheme. Wine producers and wholesalers in the State of California cooperated to maintain the price of their products. 445 U.S. at 99-103, 100 S.Ct. at 940-41. Again, the combination or conspiracy was evident even in the absence of state activity to enforce the scheme. The only issue before the Supreme Court was whether California could shield the concerted action from antitrust liability. *See id.* at 99, 100 S.Ct. at 940.

These cases merely establish that the status of the one governmental actor will not serve to insulate the concerted activity of others from antitrust liability. Here, however, the only parties are MDIA and McKeesport and thus the only alleged concerted action in this case exists between them. In these circumstances the hybrid restraint analysis is simply not applicable.

At bottom this action is viable under the Sherman Act only if MDIA had a duty to refuse before the May 5, 1982, resolution was adopted to provide information regarding its services to McKeesport or to decline business in McKeesport after it was adopted. We are aware of no interpretation of the Sherman Act imposing such duties. In the circumstances of this case there were no activities indicating unlawful concerted action in violation of the Sherman Act and MDIA did not willfully acquire its position in McKeesport. Consequently, we will affirm the order for summary judgment to the defendants on the Sherman Act claims.

III. THE PENDENT STATE LAW CLAIMS

Englert argues that the district court erroneously concluded that he did not oppose the dismissal of his state constitutional claims. His brief describes the order of November 3, 1988, as "dismiss[ing] with prejudice [his] claims under the Pennsylvania Constitution, incorrectly concluding that 'plaintiff has not opposed' such dismissal."

Englert maintains that his memorandum "merely agreed that should the District Court grant defendants' motions for summary judgment on the Sherman Act claims, 'it would probably be inappropriate to proceed with federal adjudication of the pendent state claims.'" Thus he argues that the district court, on the basis of *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130 (1966), should have declined to continue to exercise jurisdiction over the pendent claims and it should have then dismissed these claims *without* prejudice. We agree inasmuch as the federal issues were terminated before trial. *See Carnegie-Mellon University v. Cohill*, 484 U.S. 343, ___, 108 S.Ct. 614, 618-19 (1988). Thus, we will vacate the district court's order in part and remand this matter for the entry of an order dismissing the state constitutional claims without prejudice.[12]

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12. It appears that the pendent claims under count VI were asserted only against McKeesport as Englert in his reply brief in the district court on the summary judgment proceedings said that he "reiterates his earlier statements that he has not asserted any state constitutional claims against MDIA, and agrees that MDIA would not be an appropriate defendant to such claims." We, however, will not dwell on the point as the issue of who would be a proper defendan in the state court is not before us. Rather, that is a matter for the state court. We also note that MDIA raises various defenses regarding the pendent claims but we do not pass on them.

IV. CONCLUSION

We will affirm the order of November 3, 1988, granting the defendants summary judgment on counts I and II of the complaint but will vacate the order dismissing count VI of the complaint with prejudice and will remand the matter to the district court for entry of a modified order consistent with this opinion dismissing count VI without prejudice.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

Opinion and Order of the United States District Court for the Western District of Pennsylvania, Dated November 3, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 83-653

THOMAS ENGLERT d/b/a NORTHEAST ELECTRICAL INSPECTION AGENCY,
Plaintiff,

v.

CITY OF McKEESPORT and MIDDLE DEPARTMENT INSPECTION AGENCY, INC.,
Defendants.

OPINION

WEBER, D.J. November 3rd, 1988

Plaintiff filed this antitrust action, alleging that the City of McKeesport and the Middle Department Inspection Agency (MDIA) acted in concert to enact a city ordinance which made MDIA the exclusive electrical inspector in the City of McKeesport. After several previous skirmishes resulting in reported Opinions,[1] we now consider plaintiff's motion for partial summary

[1] *Englert v. City of McKeesport,* 564 F.Supp. 375 (W.D. Pa. 1983); rev'd 736 F.2d 96 (3d Cir. 1984); on remand, 637 F.Supp. 930 and 640 F.Supp. 1329 (1986).

judgment and defendants' cross motions for summary judgment. All parties have filed briefs and extensive evidentiary materials, and the motions are ripe for disposition.

FACTS

MDIA performs electrical inspections on construction jobs to ensure that the work is done to code specifications. Often such an inspection is a prerequisite to issuance of an Occupancy Permit.

Plaintiff was an electrical inspector employed by MDIA until August 27, 1981 when MDIA fired him after learning that he was considering starting a competing electrical inspection business. Freed of his worker's shackles, plaintiff founded Northeast Electrical Inspection Agency and began competing with MDIA for business.

Plaintiff appears to have had some initial success, at least in McKeesport. During his first 8 months in business plaintiff earned fees of $2,539 from projects in McKeesport where MDIA earned $3,714 over the same period.

On May 5, 1982, the City of McKeesport passed an ordinance which made MDIA the City's exclusive electrical inspector. No Occupancy Permit would issue unless MDIA had performed the electrical inspection. The City asserts that it passed the ordinance in an effort to tighten up its enforcement of its building codes, because MDIA was uniquely well-qualified and reliable, and because MDIA's record keeping was efficient and beneficial to the City.

The new ordinance significantly impaired plaintiff's business in McKeesport. If a project required a City Occupancy Permit, the Contractor could not employ plaintiff's firm because the City would only issue the

permit upon receipt of an MDIA report. Therefore, plaintiff could only perform inspections on jobs that did not require Occupancy Permits, precluding plaintiff from a large segment of the work available in McKeesport.

Plaintiff filed this suit alleging violations of Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§1, 2, and asserting other subsidiary claims. Defendants both assert various grounds for summary judgment. For the reasons stated we conclude that plaintiff cannot produce sufficient evidence of "concerted activity" or willful conduct by MDIA to sustain his antitrust claims and summary judgment is therefore appropriate.

DISCUSSION

Plaintiff's claims under Sections 1 and 2 of the Sherman Antitrust Act are both dependent on the assertion that MDIA participated in the passage of the ordinance at issue. Under Section 1, plaintiff must establish a "contract, combination . . . or conspiracy." 15 U.S.C. §1. In short, concerted activity. Under Section 2, plaintiff must establish not only that MDIA had a monopoly position, but that its acquisition of that position was willful. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966). Wilfullness requires some element of bad or anticompetitive conduct. E.g., *Weiss v. York Hospital*, 745 F.2d 786, 828 n.73 (3d Cir. 1984); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273-275 (2d Cir. 1979).

To sustain either or both of his claims then, plaintiff must establish that MDIA participated in some way with McKeesport to accomplish its monopoly status. If McKeesport acted alone and MDIA acquiesced, plaintiff's claims fail because independent action, even though it creates an exclusive arrangement, is not prohibited. A party has the right to deal or refuse to deal

with whomever it likes, as long as it does so independently. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). As that Court recited, in the context of a distributor termination:

> There must be evidence that tends to exclude the possibility that the manufacturer and non-terminated distributors were acting independently. As Judge Aldisert has written, the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'

465 U.S. at 764, quoting *Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105, 111 (3d Cir. 1980).

Reviewing the evidence of record in this light, we find little evidence, either direct or circumstantial, which even arguably supports a finding of concerted activity. Pressed to identify its evidence on this issue plaintiff recites the following:

> a) MDIA provided information to McKeesport prior to passage of the ordinance.
>
> b) A representative of MDIA attended the council meeting at which the ordinance was passed, and he sat with the City's electrician.
>
> c) The City advised contractors of the need to hire MDIA under the new ordinance.
>
> d) MDIA accepted and performed all work requested of it.

None of these facts, either alone or in concert, tends to support plaintiff's allegation of concerted activity. We can dispose quickly of the last 2 facts because they occurred after the fact and are perfectly consistent with

innocent, independent action by the City. If the City had independently passed this ordinance as defendants claim, it would have had to advise contractors of the change, just as it did here, and MDIA would certainly have been justified in accepting all the benefits of this independent action. Thus c) and d) listed above do not tend to disprove independent action.

The same can be said of the fact that an MDIA representative attended the City Council meeting. Is there anything unusual in MDIA's having a representative at a public meeting concerning legislation affecting the company? Or in having that person sit next to the City employee who routinely deals with electrical inspectors? These facts are perfectly consistent with independent action by the City and they do not tend to preclude the possibility of independent action.

Finally, plaintiff makes much of the fact that MDIA provided information to the City at the City's request prior to passage of the ordinance. Courts have recognized that the mere fact that defendants have communicated prior to accomplishment of the exclusive arrangement is not alone sufficient evidence of concerted activity. E.g., *Monsanto,* 465 U.S. 752; *Sweeney & Sons, Inc.,* 637 F.2d 105. The City and electrical inspectors in the course of their dealings have a legitimate interest in the free exchange of information. *Monsanto,* 465 U.S. at 763-764. In *Monsanto,* complaints by distributors to a supplier who later acted to the benefit of the complaining distributors would not support an antitrust violation without more.

Plaintiff also points to the chronology of events. Plaintiff was fired by MDIA on August 27, 1981. He immediately started his own business and competed successfully against MDIA in McKeesport until the City passed the subject ordinance on May 5, 1982.

Standing alone this chronology does no more than allow a jury to speculate on MDIA's role. In considering this evidence as well as the facts described above, we are mindful of the Third Circuit's direction in *Sweeney & Sons, Inc.*:

> Direct proof of an express agreement is not required. On the contrary, the plaintiff may rely on an inference of a common understanding drawn from circumstantial evidence; 'The picture of conspiracy as a meeting by twilight of a trio of sinister persons with pointed hats close together belongs to a darker age.' . . . Nevertheless, appellants had the burden of adducing sufficient evidence from which the jury could find illegal concerted action on the basis of reasonable inferences and not mere speculation (citations omitted).

637 F.2d at 111. Our review of the evidence of record, particularly in light of *Monsanto* and *Sweeney & Sons*, requires us to conclude that plaintiff is unable to adduce sufficient relevant facts to support a finding of concerted activity or willful acquisition of a monopoly. For the reasons stated, summary judgment in favor of defendants on plaintiff's claims under Sections 1 and 2 of the Sherman Act will be granted.

The only other remaining claim is one asserted under the Pennsylvania Constitution. Defendants have sought summary judgment on this claim on various grounds and plaintiff has not opposed it. Therefore summary judgment will be granted to defendants and that claim will be dismissed with prejudice.

An appropriate Order accompanies this Opinion.

CASE CLOSED
72 cs

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 83-653

THOMAS ENGLERT d/b/a NORTHEAST ELECTRICAL INSPECTION AGENCY,
Plaintiff,

v.

CITY OF McKEESPORT and MIDDLE DEPARTMENT INSPECTION AGENCY INC.,
Defendants.

ORDER

AND NOW, in accord with the accompanying Opinion, it is hereby ORDERED that Summary Judgment is GRANTED in favor of defendants on all remaining claims, and the action is DISMISSED.

The Clerk is DIRECTED to mark this matter CLOSED.

SO ORDERED this 3rd day of November, 1988.

GERALD J. WEBER
Gerald J. Weber
United States District Judge

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APPENDIX C

Opinion and Order of the United States District Court for the Western District of Pennsylvania, Dated June 18, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 83-653

THOMAS ENGLERT, d/b/a NORTHEAST ELECTRICAL INSPECTION AGENCY,
Plaintiff,

vs.

CITY OF MCKEESPORT and MIDDLE DEPARTMENT INSPECTION AGENCY, INC.,
Defendants.

OPINION

This antitrust action alleges that an exclusive arrangement between the City of McKeesport and the Middle Department Inspection Agency (hereinafter "Middle Department") for performance of electrical inspections within the city violates *inter alia* §1 and §2 of the Sherman Act.[1] The action is currently before us on Motions for Judgment on the Pleadings as to Counts I and II (The Sherman Act claims) brought by both

[1] Other claims which are not addressed in these motions allege violations of the 14th Amendment and pendant state claims of unfair competition, business disparagement and slander per se, as well as violations of the Pennsylvania constitution.

defendants. Plaintiff has responded in opposition to defendants' motions, and the issues have been briefed by the parties.

Because defendants have moved for judgment on the pleadings,[2] we take as true the allegations of plaintiff's amended complaint. *Bryson v. Brand Insulation, Inc.*, 621 F.2d 556 (3d Cir. 1980). We also draw all inferences to the benefit of plaintiff and against the moving parties. *Mortensen v. First Federal Savings & Loan Association*, 549 F.2d 884 (3d Cir. 1977).

In relevant part, the Amended Complaint indicates that on May 5, 1982, the City of McKeesport enacted a resolution by which city officials were authorized and directed to enter into an agreement with Middle Department, a private party which is independent of the city, whereby Middle Department would perform all electrical inspections work for the City of McKeesport.[3] Plaintiff alleges that, pursuant to this resolution, Middle Department and McKeesport entered into an agreement whereby Middle Department was granted the exclusive right to perform all electrical inspections on electrical work done within the city. Plaintiff, a competing electrical inspector, claims that the resolution and agreement violate the antitrust laws.

[2] Defendants have provided with their briefs matters outside the pleadings as exhibits. Plaintiff has also attached evidentiary materials to its complaint. Under these circumstances, we would normally treat these motions as summary judgment motions under F.R.Civ.P. 56. However, in this case, a period of discovery which was directed exclusively to the question of state action exemption was limited by this court on defendants' representation that no discovery was necessary for plaintiff to respond in opposition to its motion for judgment on the pleadings. *See* Plaintiff's Motion to Compel Discovery; Defendant's Response thereto, and this Court's Orders dated 8/9/84 and 11/1/84.

[3] The Middle Department Inspection Agency is a private enterprise sponsored by the insurance industry. It is used by insurance companies, public utilities and municipalities for inspection services.

STATE ACTION IMMUNITY

The City of McKeesport moves for judgment on the pleadings claiming that its actions as alleged by the plaintiff are immune from antitrust liability since the resolution in question was passed pursuant to a clearly articulated and affirmatively expressed state policy. McKeesport thus alleges that its conduct falls within the "state action" exemption set forth in *Parker v. Brown*, 317 U.S. 341 (1943). The motion of Middle Department also relies in part on this affirmative defense. We do not agree that defendants have satisfied the requirements necessary for their conduct to be considered immune from antitrust scrutiny as "state action". Accordingly, we will deny defendants' motions based on the following reasoning.

The scope of "state action" immunity as it pertains to activities undertaken by cities and/or by private parties has recently been clarified by the Supreme Court. To qualify as "state action", anticompetitive activities *by a municipality* must have been undertaken pursuant to a clearly expressed state policy. *Town of Hallie v. City of Eau Claire*, 53 U.S.L.W. 4418 (March 27, 1985). A city need not demonstrate that the state "compelled" it to act, to satisfy this "clear articulation" requirement. Rather it is sufficient for a city to show that the state specifically authorized its cities to provide certain services, and that the state has delegated to the cities the express authority to take action that *foreseeably will result in anticompetitive effects. Town of Hallie*, at 4421. Since the city is a public body exposed to public scrutiny, it is presumed to act in the public interest. For this reason, the Supreme Court decided that in order for a city to claim immunity for its own anticompetitive activities, the *only* requirement it must satisfy is the "clear articulation" test, *Hallie*, at 4422.

This is not the case when the activities being scrutinized are those of a private party such as Middle Department. In that instance, in addition to satisfying the "clear articulation" requirement, the private party must also show that it satisfies a second requirement referred to as "active state supervision." *See California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Southern Motor Carriers Rate Conference, Inc., et al. v. U.S.*, 53 U.S.L.W. 4422, 4426 (March 27, 1985). Since the activities complained of in this action were not solely undertaken by the city, but also involve a delegation of authority to a private party, it will be necessary for us to examine whether both the "clear articulation" requirement and the "active state supervision" requirement have been satisfied.

In attempting to establish that McKeesport's actions were taken pursuant to a "clearly articulated and affirmatively expressed state policy," McKeesport relies primarily on statutory provisions of the Pennsylvania Third Class City Code, 53 Pa. Stat. Ann. §35101, *et seq.*, specifically §39132. Since McKeesport is a third class city which has adopted a home rule form of government, the city is governed by these provisions of general law, *see* 53 P.S. §1-401, unless it adopts alternate provisions of its own. In this case, §39132 would apply to McKeesport, and it reads as follows:

> Council may appoint building inspectors, housing inspectors, fire prevention inspectors, *electrical inspectors* and plumbing inspectors and *fix their compensation.* Such inspectors shall have the right to enter upon and inspect any and all premises at all reasonable hours for the administration and enforcement of the building ordinances, the housing ordinance, the fire prevention ordinance, the

> electrical ordinance and plumbing ordinance. *Any fees payable to them under* the building ordinance, the housing ordinance, the fire prevention ordinance, *the electrical ordinance* and the plumbing ordinance *shall be paid by them to the city treasurer for the use of the City* as promptly as may be (emphasis added).

We have no doubt that this statute provides a "clearly articulated" state policy authorizing the city to provide electrical inspection services which could foreseeably result in anticompetitive effects. Had the city itself hired persons to do electrical inspection work and had it set any reasonable fee for the provision of such services, our inquiry would end here with a finding of "state action" immunity for the city. Instead the city decided to delegate the function of electrical inspection to a private party.

Plaintiff claims that this delegation by the city is not within the contemplation of the statute, if for no other reason than the fact that the statute specifically contemplates that fees for electrical inspection services would be set by the city and not by a private party placed in the position of exercising monopoly power. Both McKeesport and Middle Department have admitted that McKeesport exercises no control over the amount of the fee charged by Middle Department for its electrical inspection services. *See* Answer of Middle Department ¶8; Answer of McKeesport ¶8.

In examining the statute, we agree that the legislative grant of authority under 53 P.S. §39132 includes a provision that the city may "fix the compensation." Whether or not this section of the statute was intended to operate as a limitation on the city's ability to delegate the provision of this service to a private party, as

plaintiff argues, need not be decided by us at this time. The fact remains that Middle Department's activities must be shown to have "adequate state supervision" by McKeesport in order to fall within the protection of "state action" immunity. *See Southern Motor Carriers Rate Conference,* 53 U.S.L.W. at 4424. We accept defendants' evidentiary materials which tend to show McKeesport does exercise control over standards and practices employed by Middle Department in conducting its electrical inspections.[4] However, we agree that the admission of defendants that McKeesport maintains no control over Middle Department's fees is sufficient as a matter of law to preclude a finding of state action immunity since there is not "adequate state supervision" over fee-setting. *See California Retail Liquor Dealers Asso. v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980).[5]

---

[4] In support of their assertion that McKeesport exercises control over standards, methods and/or practices employed by Middle Department in conducting its electrical inspections, defendants have submitted copies of various ordinances by which McKeesport has adopted and amended its building and electrical standards/codes, showing that the city has adopted the National Electrical Code. Other exhibits include copies of various filing cards which are systematically maintained at the City Clerk's Office. These cards record electrical inspections as they are performed, giving information as to date and place. Through this system the city is made aware of various construction projects within its limits and of the performance of the requisite inspection thereon. Plaintiff does not dispute the existence of the electrical ordinances and other procedures.

[5] In *Midcal,* a California state statute permitted or authorized price setting by wine producers, and enforced the prices so established, but the state did not in any way regulate or review the reasonableness of the price schedules. Therefore, no state action immunity was found. Defendant attempts to distinguish *Midcal* from our case indicating that the particular service involved herein is a traditional, governmental function designed to protect public health and safety. *See Town of Hallie v. City of Eau Claire,* 700 F.2d 376 (7th Cir. 1983) (Appellate Court held that "active state supervision" prong of *Midcal*

(Footnote continued on following page.)

ANTITRUST INJURY

While we agree that the allegations of unsupervised fee-setting standing alone, are sufficient under the circumstances to preclude this court from granting defendant's motion based on a claim of "state action" immunity, we question whether in view of these limited allegations, plaintiff will be able to sustain its continuing burden of showing antitrust injury.

Section 4 of the Clayton Act grants standing to sue for treble damages to "any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws . . ."

Federal courts have used various tests to assist them in defining who may sue and for what type of antitrust injury. *See, e.g. Loeb v. Eastman Kodak Co.*, 183 F. 704 (3d Cir. 1910) (adopting "direct injury" test); *Conference of Studio Unions v. Loew's Inc.*, 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied* 342 U.S. 919 (1952) (employing the "target area" approach); *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1151-1152 (6th Cir. 1975) (asking whether the injury is "arguably within the zone of interests protected by the antitrust laws"). Recently the Supreme Court reviewed these tests and decided that selection of a precise black-letter rule to be applied in each case was virtually impossible. *Associated General Contractors of CA, Inc. v. California State Council of Contractors, et al.*, 459 U.S. 519 (1983). Each case is to be analyzed individually.

(Footnote continued from preceding page.)
test for exempting private conduct need not be met because the city was engaging in a traditional local government function.) We reject this distinction, noting that the Supreme Court did not rely on this reasoning but distinguished solely between municipal conduct and that of private parties. *Town of Hallie*, 53 U.S.L.W. 4418; *Southern Motor Carriers*, 53 U.S.L.W. 4422.

It is clear, however that the Supreme Court supports the lower courts' efforts to limit standing based on §4 of the Clayton Act. *See Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972). Two cases dealing with standing requirements are brought to mind readily by the facts in this case.

One is the "hearing aid" case, *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), in which the Supreme Court decided that a purchaser of a hearing aid had standing to sue since a direct purchaser was injured in his "property" by virtue of price-fixing. If Englert lived in McKeesport, he might assert a similar sort of injury as a consumer of the inspection services, i.e. he might allege that the failure to supervise the fee-setting caused him, as a consumer, injury in the way of higher prices. However, we note that the Amended Complaint alleges that Englert resides in North Huntingdon rather than in the City of McKeesport and therefore he could not have suffered "consumer" injury.

The other case which seems most analogous to this one is the "bowling alley" case, *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977). This case arose when Brunswick Corp., by far the largest operator of bowling centers and one of the two largest manufacturers of bowling equipment in the United States, acquired competing bowling centers that had defaulted in payments for bowling equipment that they had purchased from Brunswick. Other bowling centers sued Brunswick alleging that the acquisitions might substantially lessen competition or tend to create a monopoly. At trial, the suing bowling centers showed that they had lost profits which they would otherwise have gained had the defaulting bowling centers been allowed to close by Brunswick. The Supreme Court

decided that while the suing bowling centers' loss occurred "by reason of" the unlawful acquisitions, it did not occur "by reason of" that which made the acquisitions unlawful, since they would have suffered this loss regardless of who bought the competing bowling centers. The antitrust violations were not the cause in fact of the injuries; competition and not lack of competition was the cause in fact. Thus the court held plaintiffs were not entitled to damages under §4.

In the case at hand, plaintiff's injuries appear to flow not from the allegations of unsupervised fee-setting which we have preliminarily found to be improper, but from the exclusive arrangement between the City and Middle Department which would otherwise fall under state action immunity from antitrust scrutiny. Englert's injuries do not appear to give him standing to sue for treble damages.

Since this issue was only indirectly raised by defendant's motion and not fully briefed by the parties, we will not determine it herein but raise it to alert the parties to address the court's concerns in this area.

NOERR-PENNINGTON DOCTRINE

Middle Department argues alternatively that its actions are exempt under the Noerr-Pennington Doctrine. Under this doctrine, attempts to influence public officials or to obtain government action are exempt from the Sherman Act, regardless of intent or purpose. *See Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Thus Middle Department's alleged efforts to influence

McKeesport into passing ordinances would be exempt.[6] However, these are not the only allegations made. Plaintiff points out that Noerr-Pennington does not apply where a governmental entity has been named as a co-conspirator with a private party trying to influence it, where no state action exemption exists, relying on *Duke & Co., Inc. v. Foerster,* 521 F.2d 1277 (3d Cir. 1975). Since we cannot say that plaintiff "can prove no set of facts in support of his claim which would entitle him to relief", we will not dismiss plaintiff's claims against Middle Department on this basis. *Conley v. Gibson,* 355 U.S. 41 (1957).

LOCAL GOVERNMENTAL ANTITRUST ACT

Defendant Middle Department also raises the enactment of Local Government Antitrust Act of 1984, P.L. 84-544, 53 U.S.L.W. 47 (Oct. 24, 1984) as an alternate ground for granting pretrial relief. However, Section 3(b) of the Act limits its application. This case was commenced prior to the effective date of the Act, and there has already been an appeal taken from a prior decision of this court. Defendant faces a heavy burden, in light of these circumstances, in attempting to establish that it would be "inequitable" not to apply the Act. We believe that the equities do not favor the application of this Act to limit plaintiff's claim for relief in this case.

An appropriate order will issue.

[6] *See* Amended Complaint, ¶18(a) and (b).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 83-653

THOMAS ENGLERT, d/b/a NORTHEAST ELECTRICAL INSPECTION AGENCY,
Plaintiff,

vs.

CITY OF McKEESPORT and MIDDLE DEPARTMENT INSPECTION AGENCY, INC.,
Defendants.

ORDER

NOW, this 18th day of June, 1986, having considered defendants' motions for judgment on the pleadings and plaintiff's response thereto, IT IS ORDERED that:

1. defendants' motions are DENIED.
2. the defendants shall submit their supplemental brief solely on the issue of standing to sue under §4 of the Clayton Act for treble damages *on or before July 15, 1986*; plaintiff shall file its supplemental responsive brief *on or before July 30, 1986*;
3. discovery shall be completed by *September 30, 1986*;
4. plaintiff's pretrial narrative shall be filed on or before *October 15, 1986*;

5. defendants' pretrial narratives shall be filed on or before *October 30, 1986*;

6. No later than the date for filing Plaintiff's Pretrial Narrative either party shall file any motions for Summary and/or Partial Summary Judgment, fully supported and briefed; any Motions in Limine; request for special voir dire interrogatories; and trial briefs on any unusual questions of law. The filing of such motions does not stay the filing of Pretrial Narratives.

   If any such motions are filed the responding party shall, on or before the date set for filing Defendant's Pretrial Narrative, file its Response, fully supported and/or briefed.

   The purpose of this is to require all pretrial motions, and the responses thereto to be filed in time for a response, and consideration and determination at the time of the pretrial conference, and no later. Nothing herein should deter the filing of appropriate possibly dispositive motions at the earliest time appropriate in the lawsuit.

7. A Pretrial Conference will be scheduled thereafter.

GERALD J. WEBER
GERALD J. WEBER
U.S. DISTRICT JUDGE

cc: All counsel

APPENDIX D

Opinion and Order of the United States District Court for the Western District of Pennsylvania, Dated August 22, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 83-653

THOMAS ENGLERT d/b/a NORTHEAST ELECTRICAL INSPECTION AGENCY,
Plaintiff,

v.

CITY OF McKEESPORT and MIDDLE DEPARTMENT INSPECTION AGENCY, INC.,
Defendants.

OPINION

WEBER, D.J.

In this antitrust action challenging an exclusive arrangement under which the City of McKeesport granted the Middle Department Inspection Agency the right to perform all electrical inspection work within McKeesport, defendants have filed supplemental motions for judgment on the pleadings. These motions address this court's concern as to whether plaintiff could prove the requisite injury necessary to establish standing to sue for treble damages under Section 4 of the Clayton

Act. Plaintiff, a competitor for electrical inspection work, has filed a brief in opposition to these motions and has requested a stay of discovery pending our decision.

Plaintiff argues that it can establish the requisite antitrust injury necessary to sue under §4. Plaintiff indicates that it has complained that the City restrained trade by its exclusive arrangement with Middle Department and that this conduct was illegal under the antitrust laws. This court has determined that the exclusive relationship is not entitled to state action exemption under *Parker v. Brown*, 317 U.S. 341 (1943). *See* court's Opinion and Order of June 18, 1986. Plaintiff is a competitor in the market in which the anticompetitive scheme for electrical inspection work is present, and suffered direct injury as a result of his status as a competitor who was excluded from the market.

Defendants' argue that *but for* the City's failure to supervise fee setting, the conduct complained of would be immune from antitrust liability as "state action" under this court's June 18, 1986 ruling. Thus it is the City's failure to supervise fees and not the exclusive relationship between McKeesport and Middle Department which makes defendants' acts unlawful. Plaintiff must show direct injury resulting from the alleged antitrust violation. *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983). Since plaintiff's claim for lost profits bears no causal relationship to the amount of fees charged but flows instead from the selection of Middle Department as the exclusive electrical inspector for the City, defendants argue that plaintiff cannot prove "injury of of the type the antitrust laws were intended to prevent and *that flows from that*

which makes defendant's acts unlawful." (Emphasis added.) *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

Plaintiff persuasively rebuts this argument by clarifying that it is not the unsupervised fee-setting which make defendants' acts illegal. Rather, the City's failure to supervise fee-setting merely prevents it from claiming state action exemption. Without the exemption, the City is subject to the antitrust laws as is any other entity. It is the restraint of trade, the elimination of competition, which the antitrust laws were intended to prevent, and elimination of competition is what is complained of here and is that which caused plaintiff's injury. *See Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519 (1983); *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 965 (3d Cir. 1983) *cert. denied* 465 U.S. 1024 (1984). There is here no possibility of duplicative recovery or overly complex damage claims. *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 728 (1977).

We believe plaintiff has shown that it is in the class of persons considered to be injured in business or property under §4 of the Clayton Act and therefore may pursue treble damages. An appropriate order will issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 83-653

THOMAS ENGLERT d/b/a NORTHEAST ELECTRICAL INSPECTION AGENCY,
Plaintiff,

v.

CITY OF McKEESPORT and MIDDLE DEPARTMENT INSPECTION AGENCY, INC.,
Defendants.

ORDER

NOW this 22nd day of August, 1986, in accordance with the accompanying opinion, IT IS ORDERED that defendants' supplemental motions for judgment on the pleadings are DENIED. Plaintiff's motion for a stay of discovery is now MOOT. The pretrial schedule is ENLARGED as follows:

1. Discovery shall be completed by *November 1, 1986.*

2. Plaintiff's pretrial narrative shall be filed *on or before November 10, 1986.*

3. Defendants' pretrial narratives shall be filed *on or before November 20, 1986.*

5. Motions are to be filed in accord with this court's earlier Rule 5II rulings.

6. A pretrial conference will be scheduled thereafter.

GERALD J. WEBER
GERALD J. WEBER
United States District Judge

cc: James P. Hollihan, Esq.
Ronald D. Morelli, Esq.
John F. Cambest, Esq.

APPENDIX E

Opinion of the United States Court of Appeals for the Third Circuit, Dated June 11, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5507

THOMAS ENGLERT d/b/a
NORTHEAST ELECTRICAL INSPECTION AGENCY

Appellant

vs.

CITY OF McKEESPORT and
MIDDLE DEPARTMENT INSPECTION AGENCY

Appellees

Appeal From the United States District Court
For the Western District
of Pennsylvania - Pittsburgh
D.C. Civil No. 83-0653

Argued March 5, 1984
Before: HUNTER, BECKER, *Circuit Judges*, and
HOFFMAN,* *District Judge*

Opinion filed June 11, 1984

James P. Hollihan (Argued)
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---

*Honorable Walter E. Hoffman, United States District Judge for the Eastern District of Virginia, sitting by designation.

Michael J. Boyle (Argued)
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Attorneys for City of McKeesport

OPINION OF THE COURT

HUNTER, *Circuit Judge:*

1. This appeal arises from an order of the district court dismissing an antitrust action for lack of subject matter jurisdiction. Plaintiff, Thomas Englert ("Englert"), brought this suit against the City of McKeesport ("McKeesport") and Middle Department Inspection Agency ("Middle Department"), alleging, *inter alia*, violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2 (1982). The United States District Court for the Western District of Pennsylvania granted defendants' motions to dismiss for lack of subject matter jurisdiction, relying on the analysis outlined in *Cardio-Medical Associates, Ltd. v. Crozer-Chester Medical Center*, 552 F. Supp. 1170 (E.D. Pa. 1982). *Cardio-Medical* has since been reversed by this court, 721 F.2d 68 (3d Cir. 1983). In accordance with our reasoning in that case, we will reverse the present case and remand to the district court.

I

2. Thomas Englert is the proprietor of Northeast Electrical Inspection Agency ("Northeast Electrical"), engaged in the business of inspecting electrical work on public and private construction projects in western Pennsylvania.[1] Englert inspects the completed work to ensure compliance with the National Electrical Code and local building and electrical codes. Englert's inspection fee is paid by the electrical contractor, but the ultimate cost is generally borne by the owner of the building as part of the total cost of the building or project.

3. Defendant Middle Department is a rival electrical inspection agency, also doing business in the western Pennsylvania area. On May 5, 1982, the City Council of McKeesport passed a resolution granting Middle Department the exclusive right to perform electrical inspections within the city. As a result of this exclusive arrangement, Northeast Electrical is foreclosed from inspecting electrical work in McKeesport.

4. Englert brought this action against Middle Department and McKeesport, alleging that their exclusive arrangement constituted a restraint of trade, monopolization, and attempted monopolization in violation of the Sherman Act, 15 U.S.C. §§ 1 & 2 (1982). Englert also brought a claim for violation of his rights under the fourteenth amendment, along with

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1. The facts we outline here are drawn almost entirely from the allegations of Englert's complaint. This appeal arises from a Rule 12(b) motion to dismiss. The defendants have not filed answers to Englert's complaint, and have made no attempt to controvert Englert's factual allegations. For purposes of this appeal, we must take these allegations to be true. *See Mortensen v. First Federal Savings & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977).

various pendent state claims. In this appeal we need only consider the Sherman Act claims.[2]

5. Rather than answering Englert's complaint, each defendant moved immediately for dismissal of the claims against it. Both alleged failure to state a claim upon which relief could be granted, Fed. R. Civ. P. 12(b)(6); Middle Department additionally challenged the district court's jurisdiction over the subject matter of the claims, Fed. R. Civ. P. 12(b)(1), alleging an insufficient nexus with interstate commerce.

6. Englert amended his complaint in response to the jurisdictional challenge, incorporating a number of allegations designed to make out the requisite effect on interstate commerce. In particular, Englert alleged that much of the labor, material and other services involved in building construction in western Pennsylvania and McKeesport is supplied from out of state; that many of the electrical and general contractors and owners who paid the electrical inspection fees were from outside Pennsylvania; and that many of the projects inspected were financed with funds from the federal Department of Housing and Urban Development.

7. Defendants persisted in their motions to dismiss. On June 7, 1983, the district court granted the motions and dismissed Englert's suit for want of federal jurisdiction. Relying on the district court's analysis in *Cardio-Medical Associates, Ltd. v. Crozer-Chester Medical Center*, 552 F. Supp. 1170 (E.D. Pa. 1982), the court below ruled that Englert's

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2. The lower court's dismissal of Englert's federal constitutional claims has not been appealed to this court. Englert's pendent state claims were dismissed along with the federal claims. *See United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). The lower court on remand should reconsider its dismissal of the state claims in light of our reinstatement of Englert's Sherman Act claims.

jurisdictional allegations were not sufficient to establish a substantial and adverse impact on interstate commerce. This appeal arises from that dismissal.

II.

8. The district court in *Cardio-Medical* held that a mere "shifting" of interstate commerce from one entity to another, without a net change in the amount of commerce flowing across state lines, is not sufficient to engage the jurisdiction of the federal courts. 552 F. Supp. at 1178.[3] The district court in the present case similarly ruled that the defendants' behavior, which allegedly shifted inspection work away from Englert and to Middle Department, did not have the "substantial and adverse effect" on interstate commerce required under *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 743 (1976).

9. Since the date of the order and opinion below, this court has reversed the district court in *Cardio-Medical* and held that allegations of "shifting," standing alone, are in fact sufficient to satisfy the Sherman Act's jurisdictional requirement. 721 F.2d at 72-74.

10. It is clear to us, in light of *Cardio-Medical's* reading of the "substantial and adverse effect" requirement, that the district court erred in dismissing Englert's Sherman Act claims for want of subject matter jurisdiction. Taken as true, as they must be, Englert's allegations are sufficient to withstand a Rule 12(b)(1) motion. Englert has alleged

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3. For an enlightening critique of the district court's reasoning in *Cardio-Medical*, *see* Note, *Sherman Act "Jurisdiction" in Hospital Staff Exclusion Cases*, 132 U. Pa. L. Rev. 121 (1983).

that the fee charged for electrical inspections is in many cases paid by out-of-state electrical and general contractors.[4]

11. The payment of fees for professional services is certainly "commerce" within the meaning of the antitrust laws. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 783-86 (1975). Under the rule in our *Cardio-Medical* opinion, the allegation that defendants' arrangement has shifted this interstate flow of fees to Middle Department and away from Northeast Electrical and other inspection agencies, sufficiently alleges a substantial and adverse effect on interstate commerce. We hold that Englert has satisfied the Sherman Act's jurisdictional requirement.

12. Indeed, counsel for defendants conceded at oral argument that, in light of *Cardio-Medical*, Englert's complaint is adequate to withstand challenge under Rule 12(b)(1). Noting, however, that an effect on interstate commerce is an element both of the jurisdictional standard and the substantive offense, *see Mortensen v. First Federal Savings & Loan Association*, 549 F.2d 884, 890-91 (3d Cir. 1977), defendants point out that their motions to the court below also challenged the sufficiency of Englert's allegations of interstate effect under Rule 12(b)(6). *Cardio-Medical* dealt with a Rule 12(b)(1) challenge; defendants now urge us to limit that case to Rule 12(b)(1) motions, and to hold that Rule 12(b)(6) requires a greater impact on interstate commerce than

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4. Englert has also alleged that many construction projects requiring electrical inspection are financed with federal funds, and that federal funds pay the inspection fee in these cases. These other allegations also would be sufficient to meet the jurisdictional requirement of §§ 1 and 2 of the Sherman Act. *See McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980).

is required by Rule 12(b)(1). More specifically, defendants are asking us to hold that while "shifting" impacts interstate commerce sufficiently to confer subject matter jurisdiction, it is not sufficient to satisfy the interstate component of the substantive claim.

13. We find no merit to this position. The Supreme Court in *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976), squarely held that challenges to the sufficiency of the effect on interstate commerce under Rule 12(b)(1) require no different analysis than challenges under Rule 12(b)(6). "In either event, the critical inquiry is into the adequacy of the nexus between respondents' conduct and interstate commerce that is alleged in the complaint." *Id.* at 742 n.1. Consequently, we reject defendants' contention that a greater effect on interstate commerce is required to overcome a substantive challenge under Rule 12(b)(6) than a jurisdictional challenge under Rule 12(b)(1).

III.

14. Accordingly, we will reverse the order of the district court dismissing Englert's action for want of federal jurisdiction, and remand for proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX F

Memorandum Opinion of the United States District Court for the Western District of Pennsylvania, Dated June 7, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 83-653

THOMAS ENGLERT d/b/a NORTHEAST ELECTRICAL INSPECTION AGENCY,
Plaintiff,

vs.

CITY OF McKEESPORT and MIDDLE DEPARTMENT INSPECTION AGENCY,
Defendants.

MEMORANDUM OPINION

WEBER, D.J. June 1983

By this suit, plaintiff attacks an ordinance passed by the City Council of the Defendant McKeesport which gives the exclusive franchise for electrical inspection of buildings within the city's limits to Defendant Middle Department. Plaintiff, a competing electrical inspector, claims that the defendants' actions are in violation of the Sherman Antitrust Act and various provisions of the United States and Pennsylvania Constitutions, and also give rise to claims of unfair competition, business disparagement and slander.

Defendants have moved to dismiss all claims in plaintiff's complaint on various grounds. As to the antitrust claims, both defendants have moved to dismiss for failure to allege the jurisdictional prerequisite of an effect on interstate commerce. Plaintiff subsequently amended its complaint in an attempt to cure any defect.

For the reasons stated below, we conclude that defendants' motions must be granted and the complaint dismissed.

In order to invoke the jurisdiction of this court in an antitrust action, the plaintiff must allege facts which if proven would establish a substantial and adverse impact on interstate commerce. *E.g. McLain v. Real Estate Board of New Orleans,* 444 U.S. 232 (1980); *Evans v. S.S. Kresge Co.,* 544 F.2d 1184 (3d Cir. 1976). The parameters of this jurisdictional requirement have been exhaustively detailed in *Cardio-Medical Associates, Ltd. v. Crozer-Chester Medical Center,* 536 F.Supp. 1065 (E.D. Pa. 1982). In essence, to satisfy the jurisdictional prerequisite, plaintiff must allege facts establishing that interstate commerce is adversely affected by the complained of actions.

The factual allegations regarding the involvement of interstate commerce are primarily contained in paragraph 9 of plaintiff's amended complaint. Plaintiff has alleged that labor, materials and services in the construction of a building, other than those provided by the electrical inspector, are often provided by out-of-state contractors and suppliers. This allegation will not suffice to confer jurisdiction because the source of other materials and services in the construction of a building is unrelated to the work or identity of the electrical inspector, and no such connection has been alleged. Of similar nature and effect is the allegation that many

contractors and owners who pay the electrical inspection fee are not Pennsylvania residents. No adverse effect on this connection to interstate commerce has been alleged and we can conceive of none. Finally, plaintiff has alleged that many buildings within the city are financed by Federal loan programs. This fact alone is insufficient to invoke jurisdiction and no adverse effect on the federal programs has been alleged.

Plaintiff must identify the interstate commerce involved in the action, but this alone will not suffice. Plaintiff must also allege facts which if proven would establish a substantial, adverse impact on that commerce. An oblique or incidental effect is insufficient to sustain jurisdiction. *Mar-Farr Corp. v. Copley Press Inc.*, 64 F.R.D. 456 (D. Ill. 1974). Plaintiff has failed to allege such an adverse impact either in the original or the amended complaint, and the antitrust claims will therefore be dismissed.

Although plaintiff should ordinarily be accorded an opportunity to amend the complaint to correct jurisdictional defects, plaintiff here has already made an amendment in response to the motions to dismiss. The amended complaint, as discussed above, is insufficient to satisfy the jurisdictional requirement. Plaintiff has had ample opportunity to properly allege sufficient jurisdictional facts, and has unsuccessfully attempted it. The antitrust claim will therefore be dismissed with prejudice.[1]

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[1] Defendant City of McKeesport also claims by its motion to dismiss that its actions fall within the state action exemption to the antitrust provisions. Because of our disposition of the plaintiff's claims on other grounds, we do not address this argument.

Defendants have also moved to dismiss the various claims made under the United States Constitution. Plaintiff has not opposed the motion as to these claims and they may be disposed of briefly. The privileges and immunities clause does not protect the right to engage in a particular business. *Slaughterhouse Cases,* 83 U.S. 36 (1873). This claim will therefore be dismissed. Plaintiff has also failed to state a claim under due process. If the complaint purports to state a substantive due process claim, it must fall because the court may not inquire into the wisdom of economic legislation under these circumstances. Nor does plaintiff state a claim for relief under equal protection principles. Plaintiff has not alleged a suspect classification or fundamental right and under these facts the court may not review the wisdom of the City's classifications. e.g. *City of New Orleans v. Dukes,* 427 U.S. 297 (1976).

All remaining claims arise from the laws or the constitution of Pennsylvania. With no federal claim remaining, and the lawsuit being in the initial stages, pendent jurisdiction will not be exercised. Therefore, all remaining state claims will be dismissed.

For the reasons stated above, defendants' motions to dismiss will be granted and the action dismissed.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 83-653

THOMAS ENGLERT d/b/a NORTHEAST ELECTRICAL INSPECTION AGENCY,
Plaintiff,

vs.

CITY OF McKEESPORT and MIDDLE DEPARTMENT INSPECTION AGENCY,
Defendants.

ORDER

AND NOW this 7th day of June 1983, in accordance with the accompanying Opinion, it is ORDERED Defendants' Motions to Dismiss are GRANTED, and the action is hereby DISMISSED for want of federal jurisdiction. The Clerk shall mark the matter CLOSED.

GERALD J. WEBER
GERALD J. WEBER
United States District Judge

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